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No. 324.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1953.

J. & L. SNOUFFER, INC.,
Petitioner,

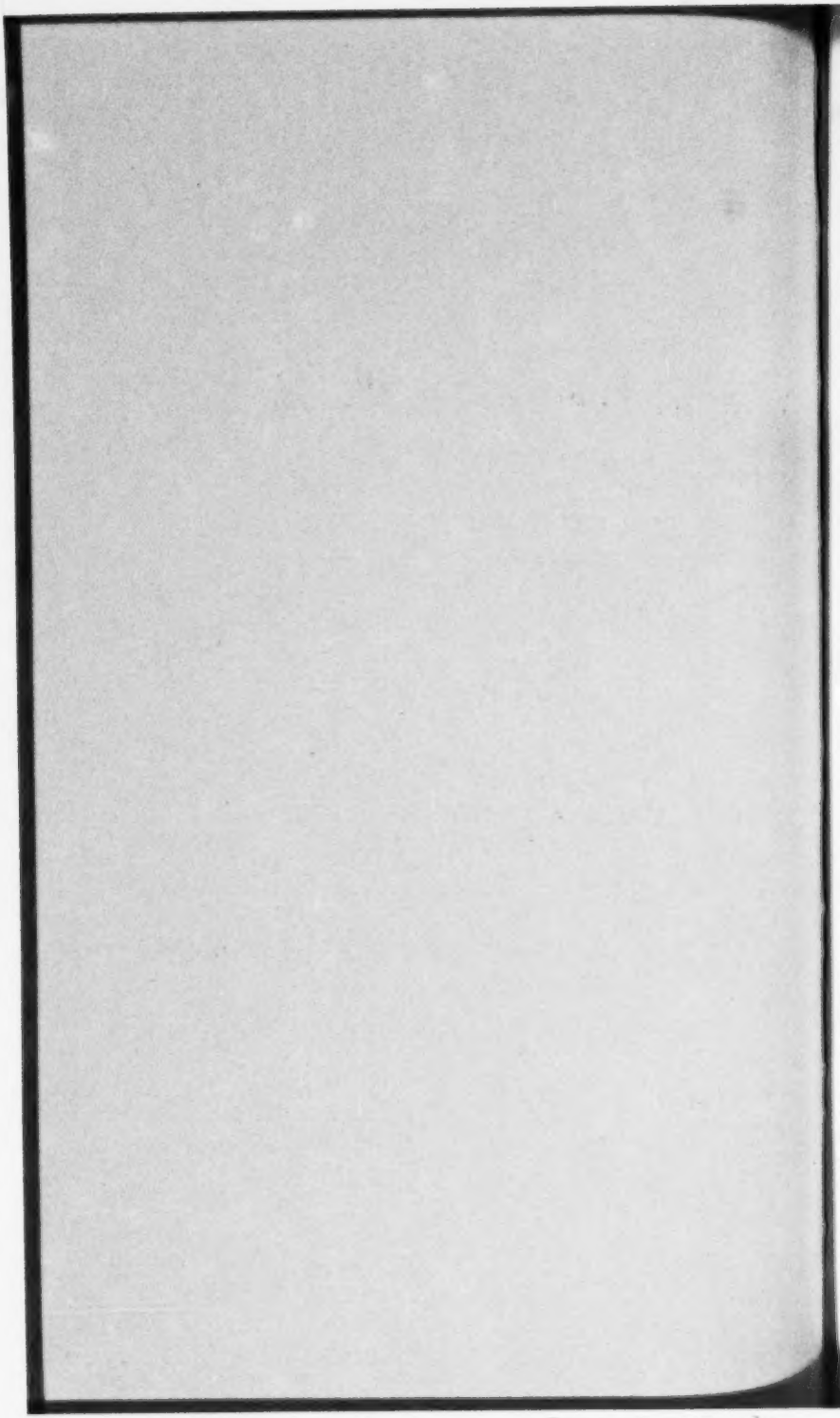
vs.

WILBUR B. ADAMS, ET AL.,
Respondents.

PETITION FOR REHEARING ON ORDER ENTERED NOVEMBER 9, 1953.

MATTHEW L. BIGGER,
50 E. Broad St., Columbus 15, Ohio,
PAUL R. GINGHER,
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Citizens Bank Bldg., Zanesville, Ohio,
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PETITION FOR REHEARING ON ORDER ENTERED NOVEMBER 9, 1953.

We were admonished, as we thought, not to argue the merits of the case, when the petition for a writ was filed herein. We refrained from doing so, but, since the respondents filed a brief giving most of their space to an argument on the alleged merits, and since, to our mind,

this court may have been misled or misunderstood the position, claims, and rights of petitioner, we deem it our duty, right, and privilege to present this petition for a rehearing of the order of this court entered November 9, 1953.

It is the conviction of petitioner and its counsel, relying on the applicable controlling decisions of this court and of the United States Court of Appeals and upon the applicable controlling, established, fixed principles of equity, that this court, and the Court of Appeals have failed to comprehend or have misunderstood the scope, purpose, character and object of petitioner's petition and claims, resulting in a denial of a hearing on the merits of petitioner's action, guaranteed by the Fourteenth and Fifth Amendments to the United States Constitution.

In order to enable the court to understand the situation of petitioner, we believe it only fair and proper that this court should understand the background of this case.

J. & L. Snouffer, Inc., was a corporation engaged in the quarrying of limestone for road building and construction purposes, and for the manufacture, sale and distribution of limestone meal for soil construction and farming purposes.

It was organized by John M. Snouffer, and his son Lawrence L. Snouffer, the deceased husband of Lillian E. Snouffer. The corporation during the husband's lifetime operated a quarry for approximately 25 years on the west side of the Scioto river in Franklin county, Ohio, about two miles south of Dublin. The region was not a thickly settled region, neither was it zoned against quarrying. This was 16 miles north of the city of Columbus.

For almost a hundred years the region immediately north and south of the Snouffer quarry had been known as a quarry region, producing a high grade of limestone used in

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the manufacture of steel, road building, construction work and limestone meal for agricultural purposes.

The largest quarry operation in that region is under the corporation known as the Marble Cliff Quarries, which occupies about 1200 acres contiguous to the city of Columbus, Ohio, and on the west bank of the Scioto river opposite one of the most thickly settled and exclusive residential sections, immediately adjoining the city of Columbus about 2½ miles northeast of the heart of Columbus, Ohio.

The Snouffer quarry property comprises 67 acres, leased by Lillian E. Snouffer to the corporation and carved out of a 134 acre tract, owned by her. Lillian E. Snouffer individually never operated this quarry or any other quarry. The original Snouffer quarry property 2½ miles south of Dublin on the west side of the Scioto was practically exhausted before the death of Mr. Snouffer and he purchased the present site for the purpose of continuing its operations, 2 miles north of Dublin on the west side of the river. After he initiated that move, death removed him, precipitating the entire operation and development into control of Lillian E. Snouffer, through the corporation.

It was at that time and after the machinery had been moved to the new location, at great expense, which was not zoned against quarries, that respondents filed the suit in equity, seeking an injunction against the corporation and Lillian E. Snouffer from establishing or operating the quarry, or from blasting, quarrying or crushing stone on the premises. The quarry had not yet been established or in operation when the petition was filed. None of the respondents had been injured in any way. None of the property on the east bank of the river, where some of respondents lived, had been injured in any way. No invasion of any legal rights of any respondents had taken place

or even alleged in respondents' petition. One of the respondents who owned 90 acres did not even have a building on his land.

Respondents herein alleged that the operation, if permitted, would cause this and that damage or injury and impair the value of their property. Upon that petition the case was tried and a permanent injunction was allowed. No other facts were alleged except at time of trial they alleged it had started operation.

There was no allegation in the petition or finding in the judgment entry of the Court of Appeals, of the existence or commmission of a nuisance or violation of any law or lawful regulation or any negligent operation or the invasion of any legal right of any respondent or of any constructive or actual appropriation of any property of any respondent herein.

The attorney for the Snouffer Co. died just after the trial and before the appeal was made to the state Court of Appeals. None of the present counsel were in the case when tried or on appeal in chancery.

None of the claims or facts set out in petitioner's petition herein, which it is contended establish the rights of petitioner herein, were present in the state court, either at the trial or on the appeal. This statement cannot be successfully controverted.

For instance, no contention was made at the trial or on appeal in the state court that under Sections 894-4-5, General Code, that the

> **"Jurisdiction to supervise the operation and development of all mines, quarries and oil and gas wells located in the state of Ohio"**

was confided exclusively to the "Division of Mines, Department of Industrial Relations", and that to the Division of

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Mines was delegated the power and the duty imposed, to

> "Make, publish and enforce necessary rules and regulations not incompatible with the mining laws of the state"

for the purpose of protecting,

> "the health and safety of persons and the protection and conservation of property within or about or in connection with mines or mining and quarries, oil and gas wells in this state".

Neither was any claim set up under Sec. 1177-43, General Code, Ohio, that the quarry had been licensed for years for the manufacture, sale and distribution of limestone agricultural meal, a vital and indispensable element to soil and farming.

That therefore, the quarry business was legalized by statute and could not be enjoined as a nuisance per se as was done in this case, without violating the Fourteenth Amendment to the United States Constitution. The controlling effect of that statute could not be waived.

It was and is the contention of petitioner that when the legislature, acting within its constitutional powers legislates on a subject matter and legalizes a business and provides for the supervision of the operation and development through a designated administrative body and delegates to such body power and imposes the duty of adopting necessary rules and regulations, for that purpose that such enactment establishes the public policy of the state and as stated in U. S. Trans. Mo. Frt. Ass., 166 U. S. 290, 340, 341, 41 L. Ed. 1007, 1027,

> "When the law making power speaks upon a particular subject over which it has constitutional power to legislate, public policy in such case is what the statute says."

By such enactment, the legislature as stated in St. Louis v. Atl. Quarry, etc., 148 S. W. 948, 950, 244 Mo. 479, 486, 485,

> "recognized their existence and continued existence of the subject matter to be regulated"

and the power to regulate, excluded the power to prohibit, and that if such an act was so construed as to prohibit, it would be declared unconstitutional.

244 Mo., 479, 485, 486, St. Louis v. Atl. Quarry, etc.:

> "The quarrying of rock is one of those things, as to which, the power to prohibit is carefully withheld. **We do not have to go to the books to ascertain that it is not a nuisance per se. We see this in the wonderful excavations that contain so important a part of the commercial and industrial activities of some of the great cities of Europe and America; conditions to which even the judges of the courts cannot close their judicial eyes. We must take judicial notice of the immense underground terminals and subways in New York, excavated from solid rock, which has in its turn been made to serve the constructive purposes of the improvement as well as of the city which sits above them.**"

This same principle was substantially declared in Yates v. City of Milwaukee, 10 Wall. 497, 499, 500, 19 L. Ed. 984, 986, wherein it was declared that a lawful business or structure "cannot arbitrarily be declared a nuisance" even by the legislature, "unless it in fact had that character. This would place every house, every business, and all the property of the city at the uncontrolled will of local authorities".

What applies to the legislative branch of the government and administrative authorities applies to the courts as declared in 166 U. S. 226, 233-235, 41 L. Ed. 979, 983-984.

It was and is the contention of the petitioner that under the applicable authorities all of this went to the want of jurisdiction of the state court.

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It was the contention of the petitioner that under the facts alleged, and under the controlling established principles of equity that **the state court had no jurisdiction to render the judgment it did render even though it had jurisdiction of the parties and the subject matter, that the judgment of the state court was in excess of the power and authority conferred by law and equity to render the judgment it did render, that such excess was a denial of due process of law and the equal protection of the laws and repugnant to the Fourteenth Amendment to the United States Constitution.** All of this is established by the authoritative decisions of this and other courts.

It is and was contended that this business being legalized by the legislature, that no court had any power to nullify that law directly or indirectly by depriving the petitioner of the lawful use of his property without compensation, that to do so, as was done in this case was a violation of the Fourteenth Amendment to the United States Constitution. It is not contended that a court of equity, in a proper case has no jurisdiction to enjoin a nuisance in fact, arising from a violation of law or lawful regulation, or acts of negligence, where the right is established at law, and where the injury cannot be compensated in damages. But that was not this case, as revealed by the petition of respondents in the state court and by the judgment of the state Court of Appeals (pp. 3a-7a, R.).

It was contended that the petitioner, under its petition and the controlling applicable decisions of this court and the Court of Appeals that the District Court had jurisdiction and that petitioner was entitled to a hearing on the merits and opportunity to establish and prove its case, that to deny it such a hearing was a denial of due process of

law and the equal protection of the laws repugnant to both the Fourteenth Amendment and the Fifth Amendment to the United States Constitution.

In 166 U. S. 226, 233, 235, 240, Chicago v. Chicago, 41 L. Ed. 979, 983, 984, 986, it was declared,

> "That a court, even with jurisdiction of the parties and the subject matter * * * might be its final judgment would be inconsistent with the Fourteenth Amendment"

being "in excess of the power or authority to render that judgment".

Then said if compensation for private property taken for public use

> "is an essential of due process of law the judgment of a state court under the authority of which the property is taken is to be deemed the act of the state within the meaning of that amendment."

It was established in Regan v. Farmers, etc., 154 U. S. 362, 397, 399, 38 L. Ed. 1014:

> "It is part of the judicial function to determine whether the act of one party, be that of an individual or organized body, or public as a whole, operates to divest the other party of rights of property or person"

guaranteed by the Constitution.

Page 410 the court said this amendment applies when an owner is deprived of the use of his property without compensation, as well as when deprived of the title to property.

The court further declared "That the power to regulate" as provided by the Ohio law is "not the power to destroy", p. 399, that the Fourteenth Amendment,

> "Forbids legislation * * * by which property of one individual is wrested from him and given to an-

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other without compensation under the Fourteenth Amendment". See Davidson v. New Orleans, 96 U. S. 97, 102.

It has been seen here that the act of the court, by a judgment rendered, in this very matter, and in this same case, "is the act of the state" the same as if it was the act of the legislature. 166 U. S. 226, 233-235, supra.

Under 185 U. S. 487, 291, 493-495, 46 L. Ed. 1003, 1007-1008, it was noted that an original case in equity, in the U. S. court, between individuals setting up a right created by the U. S. Constitution, is not to be confused with a case on appeal or error from a state court, relating to the same subject matter. The court said:

> "The distinction between the cases referred to and the one at bar is that which must necessarily exist between controversies concerning rights which are created by the Constitution or laws of the U. S. **and which are consequently in their essence federal and controversies concerning rights which are not created by the Constitution.**"

Therefore under the applicable decisions of this court, as heretofore cited in our petition for a writ of ceriorari and in our reply brief, since, petitioner has set forth facts and a cause of action under the laws and the Constitution of the U. S. and the controlling principles of equity which was not present in the state court, the United States court had and has jurisdiction and petitioner under this court's own decisions has an indisputable right to at least a hearing, "whether the cause and case is well founded or not". That is a matter to be determined on a hearing.

State v. Clarke, 54 Mo. Rep. 17 34—cited in 244 Mo. 486:

> "The word regulate certainly implies the continued existence of the subject matter to be regulated"
>
> "To regulate commerce, are words found in our Federal Constitution, and which have received a judi-

cial interpretation, and they certainly conceded that the commerce, concerning which Congress was allowed to make regulations was to be allowed under the same rules. **It did not mean to annihilate or suppress or to prohibit under all and every circumstances. No regulations or rules are necessary** concerning an evil absolutely prohibited."

This case involved a question relating to bawdy houses, which were absolutely prohibited. The court held that this special act involved was not controlled by that general law.

P. 36:

"It would be a novel exercise of judicial power to pass on the expediency of legislative enactments or matter outside of the province of the courts. The only question we have to decide is, whether the power existed to make the law and we think the legislature granted this power."

316 Mo. 492, 501, In re Rahn:

"The very highest evidence of public policy of any state is its statutory laws, and if there is legislation on the subject, the public policy of the state must be derived from such legislation. * * * **It is a naked assumption to say that any matter allowed by the legislature is against public policy. The best indication of public policy is to be found in the enactments of our legislature.**"

On Wednesday, December 31, 1952, the Marble Cliff Quarries Company had a full page ad in Columbus papers, with pictures of massive manifold operations. It stated:

"Without limestone there will be no steel. Without steel there will be no civilization."

That company as it existed now started in 1913 and is not molested. The ad further stated:

"The importance of the quarry operations at Marble Cliff to the development, and under existing condi-

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tions, to the defense and wellbeing of this community and this country is quickly realized when one learns that approximately 800 pounds of limestone is required for the conversion of iron ore into each ton of pig iron and that additional quantities of limestone, either as stone or as burned lime, is required in the further processing of the pig iron into steel. Total requirements of limestone, used in making steel approaches if not exceeds, 50,000,000 tons annually. No other method of refining ore and finishing steel is extensively practiced by the industry."

"The use of limestone as a soil corrective and for the purpose of producing bigger and better food supplies is well known. The stone at Marble Cliff, when processed through drying and pulverizing plants, admirably supplies the deficiencies and corrective agencies necessary to bring Ohio soils to a state of high productivity. Thousands upon thousands of tons are taken from Marble Cliff each year for application upon Ohio farms. The rugged health of our citizens require lime."

The same company on Monday, November 23, 1953, had another full page ad in the Columbus papers extolling its services to the community and the indispensability of its products to the life of the community, the state and the nation. It is 11 miles nearer the city of Columbus and its operations involve, because of its magnitude, a multiplied incidents of its operations, as compared to the quarry of the petitioner located 11 miles further north of the city, along the same limestone region. Its incidents and methods of operation are identical with petitioner's.

If the petition and judgment in this case can stand and if the court had jurisdiction to enter this judgment upon that petition, then every quarry in Ohio can be enjoined.

Why should one quarry, in the very same region, enjoy a monopoly in the production and sale of a mineral, which

it is contended is essential to our national life and civilization and another quarry in the same region be suppressed and destroyed and the use of its property destroyed, ostensibly just because it is small and the other big?

If the state court had no jurisdiction under equity and the United States Constitution to do what was alleged in the petition herein then there can be no dispute but that the District Court had jurisdiction and petitioner was entitled to a hearing. That obviously, can be determined, only by a hearing.

It would appear that only by disregarding all of the applicable authorities of this court and of the Court of Appeals, and the controlling, established principles of equity, going to the jurisdiction of the state court, and by treating this case as on appeal or error, and therefore res judicata, can the court, in our deliberate judgment, justify the denial of a hearing on this petition.

But to do that the court must go outside of the petition of petitioner in the District Court. But the federal courts have declared that cannot be done on a motion to dismiss. (See Stewart v. Masterson, 131 U. S. 151, 157, 33 L. Ed. 114; p. 15, pet., p. 33, R.)

Since a right in equity, going to the want of jurisdiction of the state court, and a right under the United States Constitution is clearly set forth, which were not present in the case in the state court, it would seem clear that the pronouncement of law laid down in 234 Fed. 152, 153, 154, Landon v. Pub. Util. (p. 4, our reply brief) should settle that question. Also Consold. Wyoming Co. v. Champion Mfg. Co., 62 Fed. 945 (p. 33, R.).

There can be no dispute but that a diversity of citizenship exists and that more than $3,000.00 is involved; and

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also that a substantial federal right and question is presented and involved.

Respectfully submitted,

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CERTIFICATE OF COUNSEL.

Counsel for petitioner certify that this petition for rehearing is presented in good faith and not for the purposes of delay.

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